IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE JURISDICTION

SECOND APPEAL NO.880 OF 2006

WITH
CIVIL APPLICATION NO.1459 OF 2007
IN
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CIVIL APPLICATION NO.1429 OF 2006
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SECOND APPEAL NO.880 OF 2006

Keshav Rama Mahadik & Ors. ...Appellants

Versus

Krishnji Babji Mlusare & Anr. ...Respondents

Shri Girish Godbole for the Appellants.

Shri Rajiv Patel and Shri Omkar Warange for the Respondents.

CORAM : ABHAY S.OKA, J.
DATED : 01st November, 2007.

JUDGMENT:

1. Heard the learned advocates appearing for the parties. The Second Appeal has been preferred by the original plaintiffs. The appellants filed a suit for a mandatory injunction directing the first respondent (first defendant) to remove the construction carried out by the first respondent in the suit passage between the respective houses of the appellants and first respondent. The appellants also prayed for perpetual injunction restraining the first respondent

from interfering with the rights of the appellants and second respondent in respect of the suit passage.

2. According to the case of the appellants, property bearing city survey No.2053 together with municipal house No.2053/1 to 3 situated on the northern side of Mahatma Gandhi Road at Mahad, district Raigad is the ancestral property of the appellants and the second respondent. According to the case of the appellants in the year 1948, a land on the northern side of the house on the suit property was sold to one Ramvilas Hiralal Karva and the said Ramvilas in turn sold the said property to one Govind Warang. In the year 1965, the first respondent purchased the said property from the heirs of the said Govind Ganpat Warang. Thereafter, the first respondent constructed a building bearing municipal house No.2053/2054. According to the case of the appellants there is suit a passage running from south to north having width of 4 to 4 1/2 feet between the houses of the appellants and the said house No.2053/2054 constructed by the first respondent. According to the case of the appellants, the suit passage up to the plinth of the house of the first respondent is owned by the appellants and second respondent and that the suit passage is being used by

the appellants and the second respondent as an access. It is alleged that the rain and waste water from the houses of the appellants and the second respondent passes through the suit passage. It is alleged that the suit passage has been used as the owners thereof by the appellants and second respondent and by their predecessors continuously for a period of more than 35 years. It is alleged that the first appellant has installed a water tank in the suit passage.

3. The allegation made in the plaint is that the first respondent unauthorizedly started digging work in suit passage and by ignoring the protests made by the appellants, constructed a wall having length of 50 to 55 feet in the suit passage and has removed the water tank of the first appellant. It is alleged that as a result of the construction the suit passage cannot be used as an access by the appellants and the second respondent and the right to have air and light in the house of the appellants has been affected by the construction of the wall by the first respondent.

4. In the alternative, the appellants contended that if the Court comes to the conclusion that the said passage is jointly owned by the appellants, first respondent and second respondent, the appellants are

entitled to removal of wall erected by the first respondent as the first respondent cannot erect a wall affecting the rights of the appellant and second respondent. Another contention raised in the plaint is that the appellants and the second respondent are entitled to claim easement of necessity in respect of the suit passage and in any case they are entitled to claim easement by prescription. The suit was contested by the first respondent by filing written statement.

5. The trial Court framed various issues. The trial Court held that the appellants have failed to prove their title to the strip of land i.e the suit passage. However, the trial Court accepted the case that the appellants are in enjoyment of the said passage for more than 35 years. Hence, the trial Court decreed the suit. An appeal was preferred by the first respondent before District Court. The said appeal has been allowed by the District Court by passing the impugned judgment and decree. The District Court held that the appellants have failed to prove the right of easement over the suit passage.

6. The Civil Application No.1459 of 2007 has been filed by the appellants seeking leave of this Court to

withdraw the original suit filed by them with liberty to file a fresh suit in the subject matter of the present suit filed by the appellants. Civil Application No.1429 of 2006 has been filed by the appellants for permission to lead additional evidence on their title.

7. The learned advocate for the appellants has made the submissions on merits of the Second Appeal. In the alternative he submitted that Civil Application No.1459 of 2007 deserves to be allowed. The learned advocate appearing for the appellants submitted that the Appellate Court has not at all considered the fact that the basic contention raised in the suit was that the appellants and the second respondent are the exclusive owners of the suit passage. He submitted that though a finding on the issue of title was recorded by the trial Court against the appellants, in the appeal preferred by the first respondent, the appellants could have always challenged the finding on the issue of title recorded by the trial Court without filing cross-objections. He submitted that the decree passed by trial Court could have been supported by the appellants by contending that even the finding on the issue of title or ownership ought to have recorded in favour of the appellants. He submitted that

documentary evidence on record clearly shows that the first respondent could not be the owner of the suit passage. He submitted that the appellate Court has completely misconstrued the provisions of the Indian Easement Act.

8. In support of Civil Application No.1459 of 2007 he invited my attention to the averments made in the plaint. He submitted that at the time of recording of evidence before the trial Court the appellants were not properly advised. He submitted that there is a defect in the plaint in as much as inconsistent and/or mutually exclusive pleas of the of ownership and easement have been raised in the plaint. He submitted that in view of the said pleas issue of title was decided against the appellants by the trial Court though the title of the appellants to the suit passage has not been disputed by the first respondent. He submitted that on account of the aforesaid defect in the plaint, the suit was likely to fail and therefore, a leave be granted to withdraw the suit with liberty to file a fresh suit.

9. The learned advocate appearing for the first respondent submitted that before the appellate Court issue of title was not at all canvassed by the

appellant and therefore, it is not open for the appellants to agitate the said issue in the Second Appeal. It is submitted that right of easement has not been established by the appellants. Placing reliance on decision of the Apex Court in case of K.S.Bhoopathy and others Vs. Kokila and others (2000 (5) Supreme Court Cases Page 458) he submitted that the leave as sought in Civil Application No.1459 of 2007 can never be granted.

10. I have carefully considered the submissions. It will be necessary to refer to the points for determination framed by the appellate Court. There is no point for determination framed on the issue of title and the point framed is as regards alleged right of easement. In paragraph No. 7 of its judgment, the appellate Court has observed thus:

> "As has already been held that the learned trial Court found that the plaintiffs have failed to prove their title to the suit land and have not raised cross-objection nor counter contentions challenging the said observations is canvassed before me in this appeal. The only issue that requires determination is, whether the plaintiffs have

> an easementary right to use the suit lane on asking the defendant to the wall constructed by him 55 feet east-west".

Thus, the appellate Court has observed that not even a contention was raised by the present appellants as regards the finding recorded by the trial Court on the issue of title against the appellants. Thus, it is obvious that the issue of title was not canvassed by the appellants before the District Court by contending that the finding recorded on the said issue by the trial Court was required to be set aside. Thus, the contention raised by the advocate for appellants that the appellate Court ought to have recorded a finding on issue of title cannot be accepted. It appears from the judgment of the appellate Court that the appellants defended the decree passed by the trial Court only by supporting the finding regarding existence of right of easement in their favour.

11. While dealing with the right of easement claimed by the appellants, in paragraph No.10 of the judgment, the appellate Court has observed thus:

> "10. The proprietary right of the plaintiffs to use the suit land, as has

> already been said and held by the learned trial Court is obviously not there and when the plaintiffs are claiming for the right of easement clearly means that they admit the defendant's title to the suit land because the right of easement is obviously over the property of another and not of the person who is claiming that right".

In paragraph No.9 of the judgment, the appellate Court has even dealt with alleged existence of easement of necessity in favour of the appellants. The appellate Court observed that there is nothing on record to show that without the use of the property transferred by the predecessor of the appellants, the property retained by the appellants' predecessor cannot be enjoyed.

12. It may not be out of place here to mention that in the Second Appeal the main contention of the appellants is that they are the owners of the disputed passage and that observation made by the appellate Court in paragraph No.10 is not correct.

13. The decree passed by the trial Court in favour of the appellants was on the ground that the

appellants have established their right of easement. Considering the stand taken by the appellants by claiming their exclusive ownership over the suit passage, it is very difficult to find fault with the view taken by the appellate Court that the decree passed on the ground of existence of easementary right is required to be set aside. In view of what is stated above, no substantial question of law arises and the Second Appeal deserves to be dismissed.

14. Civil Application No.1429 of 2006 is filed by the appellants for production of additional evidence. The said application is filed as the applicants desire to file on record certain documents for establishing their ownership. As the issue of ownership is not agitated by the appellants in the appellate Court, this Application need not be entertained.

15. Civil Application No.1459 of 2007 is for seeking permission to withdraw the original suit with liberty to file a fresh suit. In this connection it will be necessary to refer to law laid down by the Apex Court in the case of K.S.Bhoopathy and others (supra). Paragraph No.13 of the said judgment reads thus:

"13. The provision in Order XXIII Rule 1 CPC is an exception to the common law principle of non suit. Therefore, on principle an application by a plaintiff under sub-rule 3 cannot be treated on par with an application by him in exercise of the absolute liberty given to him under sub-rule 1. In the former it is actually a prayer for concession from the Court after satisfying the Court regarding existence of the circumstances justifying the grant of such concession. No doubt, the grant of leave envisaged in sub-rule (3) of Rule 1 is at the discretion of the Court but such discretion is to be exercised by the Court with caution and circumspection. The legislative policy in the matter of exercise of discretion is clear from the provisions of sub-rule (3) in which two alternatives are provided; (1) where the Court is satisfied that a suit must fail by reason of some formal defect, and the other where the Court is satisfied that there are sufficient grounds for allowing the plaintiff to institute a fresh suit for the subject matter of a suit or part of a claim. Clause (b) of sub-rule (3) contains the

mandate to the Court that it must be satisfied about the sufficiency of the grounds for allowing the plaintiff to institute a fresh suit for the same claim or part of the claim on the same cause of action. **The Court is to discharge the duty mandated under the provision of the Code on taking into consideration all relevant aspects of the matter including the desirability of permitting the party to start a fresh round of litigation on the same cause of action. This becomes all the more important in a case where the application under Order XXIII Rule (1) is filed by the plaintiff at the stage of appeal. Grant of leave in such a case would result in the unsuccessful plaintiff to avoid the decree or decrees against him and seek a fresh adjudication of the controversy on a clean slate. It may also result in the contesting defendant losing the advantage of adjudication of the dispute by the Court or courts below Grant of permission for Withdrawal of a suit with leave to file a fresh suit may also result in annulment of a right vested in the defendant or even a third**

> **party. The appellate/second appellate court should apply its mind to the case with a view to ensure strict compliance with the conditions prescribed in Order XXIII Rule 1(3) CPC for exercise of the discretionary power in permitting the suit with leave to file a fresh suit on the same cause of action. yet another reason in support of this view is that withdrawal of a suit at the appellate/second appellate stage results in wastage of public time of Courts which is of considerable importance the present time in view of large accumulation of cases in lower courts and inordinate delay in disposal of the cases**". (Emphasis added)

16. The prayer of the appellants for withdrawal is on the ground that though the trial Court has held the issue of ownership against the appellants, in the written statement filed by the respondents to the present suit the title of the appellants was never disputed. It is contended that there is a defect in the suit as inconsistent and/or mutually exclusive plea of ownership and easement have been taken in the plaint.

17. The appellants have not chosen to agitate the issue of ownership before the appellate Court though an opportunity was available to them. That is the reason why the finding of the trial Court on issue of ownership recorded against the appellants has become final. Now if the appellants are permitted to withdraw the suit, the said finding which has become final will have to be set aside. Thus, the respondents will loose the advantage of adjudication of the dispute as regards title by the trial Court. Therefore, in view of the law laid down by the Apex Court, permission as prayed cannot be granted.

18. Hence, I pass the following order:

(i) The Second Appeal is dismissed with no orders to costs.

(ii) Civil Application No.1459 of 2007 is rejected.

(iii) In view of dismissal of the Second Appeal, Civil Application No.1429 of 2006 does not survive and the same is rejected.

JUDGE